Supreme Court U.S.
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No. 05-1394

In The
Supreme Court of the United States

PATRICIA ANN CAREY,

Petitioner,

v.

AMY OKUBO and WILLIAM WOOD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner Patricia Ann Carey is a convicted felon serving concurrent sentences for drug possession and distribution. Ms. Carey was first arrested in Boulder County, Colorado, on July 24, 2002, and charged with drug possession and intent to sell. While awaiting trial, she was released on bond under the condition that she not consume non-prescribed drugs. She was required to undergo substance abuse monitoring to demonstrate her compliance with this bond condition.

Ms. Carey tested positive for cocaine use on August 6, 9, and 29, 2002. She also failed to appear for a urine test on September 2, 2002. On October 23, 2002, Ms. Carey was arrested in a second case, again based on drug possession and distribution charges, and she was once again released on bond. While on pre-trial bond, Ms. Carey tested positive for cocaine use on November 19, December 1, and December 9, 2002. She also failed to appear for scheduled urine tests on November 29, December 8, and December 15, 2002. Based on these bond condition violations, a Boulder County Judge issued warrants for her arrest.

On June 22, 2004, Ms. Carey was arrested on the outstanding warrants. She was released from custody with pre-trial bond conditions, including that she not consume non-prescribed drugs and that she submit to substance abuse monitoring. On June 30, 2004, an Enzyme Immunoassay ("EIA") test showed the presence of cocaine in Ms. Carey's urine. Based on the test results, Respondent William Wood, performing his duties as a bond case manager, requested that the District Attorney file a motion to revoke Ms. Carey's bonds. Respondent Deputy

District Attorney Amy Okubo reviewed the test results and prepared motions to revoke the bonds.

Boulder County District Court Judge Glowinsky reviewed Ms. Okubo's motions and issued arrest warrants for Ms. Carey, who was arrested on July 13, 2004. After a July 26, 2004, hearing on the motions to revoke bond, Judge Glowinsky found that the People had not met their burden of proving a bond violation and denied the motions to revoke bond.[1] Ms. Carey was released on bond following the hearing.

The next day, Ms. Carey tested positive for cocaine. The test result was confirmed by an EIA test and by a Gas Chromatograph Mass Spectrometry ("GC-MS") test. On August 9, 2004, Boulder County District Court Judge Glowinsky revoked Ms. Carey's bond and approved warrants for her arrest. In late August, 2004, Ms. Carey was arrested on federal drug charges. Ms. Carey was later convicted in all three cases and sentenced to prison.

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[1] Ms. Carey's Petition for a Writ of Certiorari ("Petition") contains a misstatement because it incorrectly indicates that "[a]t the hearing before the Boulder County District Court, it was revealed that subsequent tests failed to confirm the presence of drugs in Ms. Carey's system. As a result the motions to revoke bonds were dismissed". Petition at 4. The Boulder County District Court Judge did not make her ruling based upon any "subsequent tests". Judge Glowinsky found that the People had not met their burden of proving a bond violation following a hearing in which Ms. Carey presented expert testimony without notifying the District Attorney in advance. At the hearing, Ms. Carey's expert testified that the June 30, 2004 urine sample should have been tested by a Gas Chromatograph Mass Spectrometry test. A subsequent GC-MS test of the June 30, 2004 urine sample confirmed the presence of cocaine at a higher level than the EIA test.

Ms. Carey filed a 42 U.S.C. § 1983 action against Ms. Okubo and Mr. Wood. The federal district court dismissed the lawsuit, finding that Ms. Carey failed to state a constitutional tort in her complaint and that Ms. Okubo and Mr. Wood were entitled to qualified immunity and absolute prosecutorial immunity. The Tenth Circuit affirmed, holding that Ms. Okubo and Mr. Wood were entitled to absolute prosecutorial immunity.

REASONS THE PETITION SHOULD BE DENIED

This case involves the routine application of established United States Supreme Court precedent by the district and circuit courts. Because the Court has adequately addressed absolute prosecutorial immunity in the context of arrest warrants in prior cases, the lower courts simply applied the law to the facts. The district court and the Tenth Circuit considered *Kalina v. Fletcher*, 522 U.S. 118 (1997) in their absolute immunity analyses, but determined that *Kalina* was not applicable because this case did not involve a misrepresentation or material omission by Ms. Okubo. Specifically, the Tenth Circuit found that, "unlike the situation in *Kalina*, there [was] no allegation that the verified motions to revoke bond contained any false statements of fact. To the contrary, it is undisputed that the urine sample that Carey provided on June 30, 2004 tested positive for cocaine according to the lab report . . . ". Petition at 12a. Thus, this case is another in a long series of circuit court cases properly interpreting *Kalina*, and the Petition should be denied. Furthermore, Ms. Carey's claim would have been dismissed even if the Court did not find absolute prosecutorial immunity.

I. THE TENTH CIRCUIT'S FACT-BASED INQUIRY DEMONSTRATES THAT CERTIORARI IS NEITHER APPROPRIATE NOR NECESSARY

This Court has determined that absolute immunity is not available to a prosecutor who, while performing in the role of a fact witness, makes false statement of fact. *Kalina,* 522 U.S. at 120. The Tenth Circuit has interpreted the *Kalina* exception to absolute immunity to include situations where a prosecutor "knowingly or recklessly omit[s] from an arrest affidavit information, which, if included, would have vitiated probable cause". *Stewart v. Donges*, 915 F.2d 572, 582 (10th Cir. 1990). Because the precedent in this area of the law is established, the Tenth Circuit performed a fact-based inquiry to reach its decision.

In deciding this case, the Tenth Circuit analyzed Ms. Okubo and Mr. Wood's absolute immunity in the context of *Kalina,* but found that "while Okubo did indeed vouch for the truth of the facts set forth in the verified motions, her statements did not vouch for the scientific reliability of the EIA test procedure. Instead, the scientific reliability of the EIA test procedure was an issue for the Boulder District Court to decide, . . . " Petition at 12a. Thus, the circuit court concluded that, "unlike the situation in *Kalina*, there [was] no allegation that the verified motions to revoke bond contained any false statements of fact . . . " nor did Ms. Okubo "omit[] material information from the verified motions . . . ". Id. The Tenth Circuit also properly determined that Mr. Wood was entitled to prosecutorial immunity "because he did not personally vouch for the truth of any of the factual matters that were set forth in the noncompliance reports . . . and it [was] undisputed that he was performing a prosecutorial function . . . ". Id. at 13a.

Thus, the Tenth Circuit properly considered and distinguished *Kalina* in reaching its decision.

II. MS. CAREY'S CLAIM WOULD HAVE BEEN DISMISSED EVEN IF THE COURT DID NOT FIND ABSOLUTE PROSECUTORIAL IMMUNITY

Ms. Okubo and Mr. Wood are entitled to qualified immunity because there is no clearly established law that a positive test result for cocaine in an EIA test is an insufficient basis for a bond revocation motion. An unpublished Tenth Circuit case shows that Ms. Okubo and Mr. Wood's actions satisfy due process. In *Easter v. Saffle*, 51 Fed.Appx. 286, 289, 2002 WL 31528687 (10th Cir. 2002), the Tenth Circuit found that "[a] *single* urinalysis amounts to 'some evidence' and thus satisfies due process". (emphasis in original). *See also Koening v. Vannelli*, 971 F.2d 422 (9th Cir. 1992) (holding that subsequent GC-MS test not required to satisfy due process).

Qualified immunity is appropriate because EIA test results are routinely accepted as evidence. A California appellate court has stated that the "EMIT (enzyme immunoassay test) use(s) the well-accepted immunoassay scientific technique to detect drugs in urine" and that "jurisdictions including the Ninth Circuit of Appeals have accepted its validity for almost a decade". *People v. Nolan*, 95 Cal.App.4th 1210, 1215 (2002). Similarly, the District of Columbia Court of Appeals has stated that "EMIT test results are presumptively reliable and thus generally admissible into evidence in every case". *Jones v. United States*, 548 A.2d 35, 46 (D.C.Ct.App.1988).

As these cases demonstrate, a reversal by this Court would simply result in a dismissal on qualified immunity grounds upon remand.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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